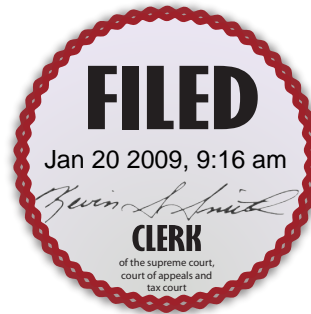


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FINEST DAVIS,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A05-0805-PC-267

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young, Judge
Cause No. 49G20-0306-PC-93552

January 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Finest Davis challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Davis claims that his trial counsel rendered ineffective assistance by failing to (1) pursue a suppression hearing or challenge the admissibility of certain evidence, (2) prepare a proper defense regarding certain white powder found in his clothing, or (3) request a jury instruction regarding the special burden of proof regarding circumstantial evidence, and that the above alleged errors, considered cumulatively, prejudiced him. We affirm.

FACTS AND PROCEDURAL HISTORY

Our opinion in Davis's direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

At approximately 2:30 p.m. on June 6, 2003, Officer Anthony Weaver of the Indianapolis Police Department ("Officer Weaver") was on patrol responding to a report that a young male was seen carrying what was described as an assault rifle at Arlington Green Apartments. As he was investigating that report, Officer Weaver observed Davis leave apartment building 6039 and head toward building 6041. Officer Weaver noted that Davis was wearing long pants, a shirt, and a hooded sweatshirt, yet the temperature was approximately seventy degrees. Tr. pp. 88-89. Davis was walking in Officer Weaver's direction, but when he saw Weaver, he turned and ran back toward building number 6039. Appellant's App. p. 95

Officer Weaver chased after Davis who ran into building number 6039. Upon entering the building, Officer Weaver saw Davis running up the stairs. Id. Officer Weaver heard Davis run up to the third floor of the building and then heard "rustling of clothing." Id. at 96. Davis ran back down the stairs, and Officer Weaver ran up the stairs meeting Davis on the second floor. Id. After Davis denied running up the stairs to the third floor, Officer Weaver led Davis up to the third floor. Id. at 97.

In front of apartment 3A, the officer observed a clear plastic baggie containing cocaine. Id. Officer Weaver proceeded to place handcuffs on Davis who was "shaking and sweating profusely." Id. at 98. Officer Weaver asked Davis why he ran from him and Davis replied that he had a "child support warrant." Id. Davis voluntarily stated that the cocaine was not his and that Officer Weaver had not seen it in his possession. Id.

Officer Weaver also observed a white substance on Davis's sweatshirt and on the back of Davis's head, which was consistent with the size of the baggie of cocaine. Tr. pp. 106-08; Ex. Vol., State's Exs. 3-5.

On June 9, 2003, Davis was charged with Class A felony dealing in cocaine and Class C felony possession of cocaine. A charging information alleging that Davis was an habitual offender was filed on July 11, 2003. Jury trial on the dealing and possession of cocaine charges commenced on May 6, 2004. At trial, a forensic chemist from the Marion County crime lab testified that the substance in the plastic baggie found by Officer Weaver was cocaine in the amount of 28.331 grams. Tr. p. 154. Sergeant David Miller, a narcotics investigator from the Indianapolis Police Department testified that possession of 28.331 grams of cocaine, where no paraphernalia is recovered from the defendant and there are no physical characteristics of cocaine use, is consistent with dealing in cocaine. Tr. p. 226.

The jury found Davis guilty as charged. On May 12, 2004, Davis pled guilty to being an habitual offender. A sentencing hearing was held on June 29, 2004, at which time Davis was ordered to serve thirty years for Class A felony dealing in cocaine [which included the merged Class C felony possession conviction] and his sentence was enhanced by thirty years as a result of the habitual offender determination.

Davis v. State, No. 49A04-0407-CR-355 (Ind. Ct. App. Feb. 15, 2006).

Additional facts at trial shed light on the circumstances leading to the discovery of the cocaine. The Arlington Green Apartments, which Officer Weaver was patrolling on the day in question, were known to be a "high cocaine or drug environment" having extensive drug trafficking. Tr. Tr. p. 130. Officer Weaver observed Davis leave building 6039 and walk toward building 6041. When Davis was within five to ten feet of Officer Weaver and saw him, he said, "F***ing police are everywhere," then he "spun around" and "took off running." Tr. App. p. 93. After Davis ran into building 6039, Officer Weaver followed him and heard him run to the third floor of the building. Upon following Davis, Officer Weaver did not see any visible substance on the back of his head. When Officer Weaver, who heard Davis run back down the stairs, met Davis on

the second floor of the building, he “took him by the arm and led him up to the third floor,” Tr. App. p. 97, where he discovered the baggie of cocaine on the floor in front of apartment 3A. Next to the baggie, which was later determined to be torn, was a white powdery residue. At this point, Officer Weaver handcuffed Davis. Officer Weaver observed that Davis had white powdery residue on the back of his head and on his sweatshirt. This residue matched the consistency and color of the cocaine inside the baggie.

Davis’s trial counsel did not pursue a motion to suppress the cocaine or any other evidence prior to trial. At trial, Davis testified that the white substance found on his head was an “anti-fungus cream” medication used to treat ringworm. Tr. Tr. p. 246. Trial counsel did not provide any evidence of test results demonstrating that the substance on Davis’s head and sweatshirt was this medication. In addition, trial counsel did not offer into evidence documentation demonstrating that Davis had a medical condition or prescription for treatment. During closing argument, however, trial counsel argued that the white substance on Davis’s head was this fungal cream.

Following trial, Jury Instruction No. 15 was submitted to the jury. It defined direct and circumstantial evidence and then stated, “Circumstantial evidence alone may be sufficient to prove any of the elements of the crime charged and no greater degree of certainty is required whether the evidence is direct or circumstantial, for in either case the burden of proof must be beyond a reasonable doubt.” Tr. App. p. 54. Trial counsel did not object to this instruction.

Following the jury's finding of guilt and Davis's conviction, Davis appealed. One of his challenges on direct appeal was to Jury Instruction No. 15, which he claimed constituted fundamental error for failing to state that in wholly circumstantial cases, proof must be such that every reasonable hypothesis of innocence is excluded. This court denied his challenge and affirmed his conviction. *See Davis*, slip op. at 8-9.

On July 5, 2006, Davis filed a petition for post-conviction relief. The post-conviction court held an evidentiary hearing on October 3, 2007, and on March 25, 2008, it issued findings of fact and conclusions and denied his petition. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

In turning to Davis's claim of ineffective assistance of trial counsel, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. *Godby v. State*, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), *trans. denied*. Because the post-conviction court denied relief in the case at hand, Davis is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole “‘leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.’” *Id.* at 482 (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v.*

State, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id.*

In order to prevail upon a claim of ineffective assistance of counsel, Davis must present strong and convincing evidence to overcome the presumption that counsel's representation was appropriate. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied*. In assessing such claims, we follow the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id.* A defendant claiming a violation of the right to effective assistance of counsel must show that counsel's performance was deficient and that it prejudiced the defense. *Id.* To establish that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness. *Id.* To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* The two prongs of the *Strickland* test are independent inquiries, and failure to satisfy either prong will cause the claim to fail. *Id.*; *see Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Lee*, 892 N.E.2d at 1233.

II. Analysis

A. Admissibility of Evidence

Davis's first challenge is to trial counsel's failure to challenge the cocaine evidence through a proper motion to suppress or an objection at trial. According to

Davis, Officer Weaver's chasing and stopping Davis, which led to the discovery of the cocaine, violated Davis's rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

An officer has the authority to briefly stop a person for investigatory purposes if the officer has reasonable suspicion of criminal activity. *Bridgewater v. State*, 793 N.E.2d 1097, 1099 (Ind. Ct. App. 2003), *trans. denied*. Reasonable suspicion exists where the facts known to the officer and the reasonable inferences therefrom would cause an ordinarily prudent person to believe that criminal activity has or is about to occur. *Id.*

In arguing that the cocaine was improperly procured and that trial counsel should have sought to suppress or exclude it, Davis relies largely upon *Bridgewater*. In *Bridgewater*, police officers investigating complaints of narcotics dealing in a high crime area observed the defendant, who was standing outside an apartment building and talking, run inside the building as they drove by. *Id.* at 1099. After a few minutes, the defendant exited the building, but when officers approached, he again ran inside the building. *Id.* The defendant subsequently came out of the building, and walked past the officers, whereupon the officers asked him why he had run and instructed him to remove his hands from his pockets. *Id.* The defendant initially complied but subsequently placed his hands back inside his pockets, prompting the officers' pat-down search which ultimately led to the discovery of a bag of drugs inside the defendant's pants. *Id.* In reversing the trial court's denial of the defendant's motion to suppress, this court acknowledged that the defendant had twice fled into the building after seeing officers but concluded that the mere fact of his walking or running from the police into the building was inadequate to

constitute reasonable suspicion of criminal activity to justify an investigatory stop. *Id.* at 1103. In reaching this conclusion, this court determined that the officers had not observed any sort of transaction or interaction between the defendant and the other two people standing in the area, he was not carrying anything unusual, and he was not doing anything else suspicious. *Id.*

In discussing applicable law, the *Bridgewater* court took note of the United States Supreme Court's opinion in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). In *Wardlow*, the Supreme Court, noting that it was proper to consider the "high crime area" location of an investigatory stop, also observed that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 124 (citations omitted). Under *Wardlow*, a defendant's presence in a high crime area and his unprovoked flight upon noticing police created adequate reasonable suspicion to justify an investigatory stop. *Id.* at 123-25.

Here, like in *Wardlow*, the defendant was present in a high crime area when he took flight for the stated purpose of eluding the police. Further, unlike in *Bridgewater*, Davis did not merely turn away from officers and enter an apartment building upon seeing them. Instead, after walking to within five to ten feet of Officer Weaver and seeing him, Davis exclaimed, "F***ing police are everywhere." Tr. App. p. 93. He then "spun around and took off running," essentially in headlong flight from Officer Weaver. Tr. App. p. 93. In sum, it appears that the facts in the instant case fall squarely within *Wardlow* and are distinguishable from *Bridgewater*. We are therefore unpersuaded by

Davis's contention that he was subject to an illegal search, the fruits of which would have been suppressed or excluded if counsel had made and pursued a proper motion or objection. *See Shields v. State*, 699 N.E.2d 636, 640 (Ind. 1998) (observing that where ineffective assistance of counsel is alleged for the failure to move to suppress or object, counsel's performance cannot be shown to be deficient where no showing is made that any such motion or objection would have resulted in the suppression of the evidence).

In his reply brief, Davis appears to concede the applicability of *Wardlow* but nevertheless pursues his ineffective assistance of counsel claim on the suppression issue by arguing that the challenged evidence would have been suppressed under an Indiana constitutional analysis, which he argues served as the basis of the holding in *Bridgewater*. Contrary to Davis's claim, the holding in *Bridgewater* is not based upon the Indiana Constitution. The *Bridgewater* court makes no mention of a separate Indiana constitutional analysis, and the cases it references are largely, if not fully, based upon an analysis of the federal Constitution. In addition, apart from claiming that he would have been successful on Indiana constitutional grounds, Davis fails to present a separate Indiana constitutional analysis. Where a party, even upon citing Indiana constitutional authority, presents no separate argument specifically treating and analyzing a claim under the Indiana Constitution distinct from its federal counterpart, we resolve the party's claim on the basis of federal constitutional doctrine only. *See Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005). Davis's challenge to his counsel's performance based upon Indiana constitutional grounds warrants no relief.

B. Fungal Cream Defense

Davis next argues that his trial counsel did not adequately pursue his defense that the substance on his head and sweatshirt was the fungal cream. At trial, Davis testified, while holding a container of the claimed medication, that the white substance on the back of his head was fungal cream rather than cocaine residue as the State alleged. During closing argument, trial counsel referred to the presence of fungal cream on Davis's head at the time of the incident in question. At the post-conviction hearing, trial counsel testified that the focus of his defense strategy was on the fact that the bag of cocaine was not found in Davis's direct possession rather than on the chemical composition of the substance found on his head. According to trial counsel, he did not become aware of the fungal cream issue until close to the trial. In denying Davis's claim that counsel was ineffective for failing to thoroughly investigate and present this defense, the post-conviction court observed that trial counsel had presented this "fungal cream defense" to the jury, and to the extent it was not fully developed, this was arguably as much in Davis's favor as against it.

In resolving this claim on its prejudice prong, we conclude that Davis has failed to demonstrate a reasonable probability that, but for trial counsel's allegedly inadequate defense, the result of his trial would have been different. First of all, although Davis presented multiple witnesses and a faded receipt at the post-conviction hearing in support of his claim that the substance on the back of his head at the time of his arrest was fungal cream, Davis fails to demonstrate that such additional testimony would have materially affected his defense. The post-conviction court was in a better position than we to assess

the witnesses' credibility, and it was within its discretion to reject their claims, especially given Officer Weaver's trial testimony that the substance at issue did not appear on Davis's head until after he ran upstairs to the third floor apartments where the cocaine was later found. Moreover, regardless of the number of credible witnesses available to testify about Davis's use of the cream, or even a receipt to that effect, this evidence does not demonstrate that the cream, as applied, would have had the uneven "clumpy" texture of the substance pictured on Davis's head. Further, the fungal cream defense, as the State points out, was before the jury. Davis testified in support of it, and trial counsel used it as part of his closing argument. Although Davis argues that trial counsel should have pursued this defense more thoroughly, Davis fails to present any evidence demonstrating that a more exacting analysis of the substances at issue would have proven more beneficial than detrimental to his defense. Perhaps most significantly, however, assuming *arguendo* that the substance on Davis's head was the fungal cream, Davis has still failed to show a reasonable probability that the jury, given this knowledge, would have reached a different result. Officer Weaver heard Davis run to the third floor of the apartment building. He then heard the sound of rustling clothing and Davis running down the stairs. Almost immediately thereafter, Officer Weaver met Davis on the second floor and escorted him to the third floor, whereupon Officer Weaver found the cocaine at issue on the floor in the limited hallway space where Davis had just been. The presence or absence of fungal cream does not change these facts which, in and of themselves, are strong evidence implicating Davis as the possessor. Accordingly, Davis

fails to show that the evidence unerringly demonstrates that the “fungal cream defense,” even if pursued according to his standards, would have changed the result of his trial.

C. Jury Instruction No. 15

Davis’s final challenge is to trial counsel’s failure to object to Jury Instruction No. 15. The State responds by arguing that this issue was resolved when it was denied as a fundamental error challenge in Davis’s direct appeal and that *res judicata* operates to bar his post-conviction claim on this point.

In his direct appeal, Davis claimed that Jury Instruction No. 15 constituted fundamental error for failing to include language to the effect that in circumstantial cases, proof must be such that every reasonable hypothesis of innocence is excluded. This court denied that claim due to Indiana Supreme Court precedent stating that failure to give such an instruction did not constitute fundamental error. Davis now raises this same claim as an ineffective-assistance-of-counsel challenge.

“Although differently designated, an issue previously considered and determined in a defendant’s direct appeal is barred for post-conviction review on grounds of prior adjudication—*res judicata*.” *Overstreet v. State*, 877 N.E.2d 144, 150 n.2 (Ind. 2007) (citing *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006)), *reh’g denied*. Davis acknowledges that *res judicata* bars a post-conviction challenge to a claim already raised on direct appeal but argues that the standard for fundamental error is different than the standard for ineffective assistance. According to Davis, the standard for fundamental error is whether the defendant received due process but the standard for ineffective

assistance is whether the defendant received a “fair, just, and reliable result.” Appellant’s Br. p. 19.

We are unpersuaded that, to the extent the above analysis highlights a distinction, such a distinction exists. First of all, as the State contends, any evaluation of the fairness of the trial’s result is largely determined according to the fairness of the trial process. *See Strickland*, 466 U.S. at 685-86 (concluding that benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that trial cannot be relied on as having produced a just result). Moreover, both analyses are based upon whether a fair trial occurred. Fundamental error occurs when an error is so prejudicial to the rights of the defendant that a fair trial is impossible. *Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008); *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). Similarly, under the United States Supreme Court’s analysis of *Strickland*, the rights embodied in the Sixth Amendment protect the fundamental right to a fair trial. 466 U.S. at 684 (cited in *Poynter v. State*, 749 N.E.2d 1122, 1125 (Ind. 2001)). Because this court’s analysis in Davis’s direct appeal evaluated the fairness of his trial in light of Jury Instruction No. 15, and the instant ineffective assistance analysis calls for this same evaluation, we conclude that *res judicata* bars our consideration of this claim.

D. Cumulative Error

Davis’s last argument is that the cumulative effect of counsel’s alleged errors regarding the fungal cream defense and Jury Instruction No. 15 deprived him of a fair trial. Having concluded that Davis failed to demonstrate that a more thorough fungal

cream defense would have altered the result of the trial, and having further observed, based upon *res judicata*, that any error with respect to Jury Instruction No. 15 did not compromise the fundamental fairness of his trial, we decline Davis's claim that the cumulative effect of these alleged errors warrants relief.

III. Conclusion

In sum, we conclude that Davis has failed to satisfy his high burden to show that the post-conviction court erred in denying him relief on the grounds that counsel was ineffective in failing to pursue a motion to suppress or more thoroughly present the fungal cream defense, or that his Jury Instruction No. 15 claim was not barred by *res judicata*. In addition we reject Davis's claim of cumulative error on the above grounds.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.